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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR, PETITIONER

v.

NEIL MCELROY, A. TYLER PORT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO PETITIONER'S OPPOSITION TO THE GOVERNMENT'S SUGGESTION OF MOOTNESS

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

INDEX

	Page
I. Petitioner's incorrect factual statements and assumptions	2
II. Petitioner's clearance as a result of a general change in the Industrial Security Program	4
III. The likelihood of further security proceedings against petitioner	13
IV. This Court's jurisprudence on mootness, as applied to petitioner's case	16
Conclusion	24

CITATIONS

Cases:

Accardi v. *Shaughnessy*, 347 U.S. 260	10, 12
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	20
Association of Lithuanian Workers v. *Brownell*, 355 U.S. 23	17, 22
Bracken v. *Securities and Exchange Commission*, 299 U.S. 504	17
Bus Employees v. *Wisconsin Board*, 340 U.S. 416	22, 23
California v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308	23
Cole v. *Young*, 351 U.S. 536	8
Commercial Cable Co. v. *Burleson*, 250 U.S. 360	17
Eccles v. *People's Bank*, 333 U.S. 426	14, 20, 24
Garcia v. *Landon*, 348 U.S. 866	17
Gray v. *Board of Trustees*, 342 U.S. 517	17, 19, 29, 22
Henderson v. *United States*, 339 U.S. 816	19
Howard v. *United States*, 340 U.S. 898	17
Leonard v. *Earle*, 279 U.S. 392	18
McGrain v. *Daugherty*, 273 U.S. 135	18
Montgomery Ward & Co. v. *United States*, 326 U.S. 690	17
National Association for the Advancement of Colored People, Inc. v. *Committee on Offenses*, 358 U.S. 40	17

486406—59— —1

Cases—Continued Page

Panama Refining Co. v. *Ryan*, 293 U.S. 388 18
Peters v. *Hobby*, 349 U.S. 331 8
Rescue Army v. *Municipal Court*, 331 U.S. 549 20
Service v. *Dulles*, 354 U.S. 363 ..... 8, 10, 12
Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U.S. 433 18
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U.S. 498 18
St. Pierre v. *United States*, 319 U.S. 41 ..... 17, 18, 22, 23
United Public Workers v. *Mitchell*, 330 U.S. 75 20
United States v. *Alaska S.S. Co.*, 253 U.S. 113 23
United States v. *Amarillo-Borger Express, Inc.*, 352 U.S. 1028 17
United States v. *Automobile Workers*, 352 U.S. 567 20
United States v. *Johnson*, 319 U.S. 302 21
United States v. *W. T. Grant Co.*, 345 U.S. 629 20

Miscellaneous:

Defense Department Directive 5220.6:

Paragraph 5 10
Paragraph 20 11
Paragraph 20d 9, 11
Paragraph 21b 10
Paragraph 22a 11
Paragraph 22c 11

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In this reply to petitioner's Opposition to our memorandum suggesting that the cause is now moot, we shall (1) correct certain significant errors in petitioner's account of what has transpired in this case with respect to mootness; (2) show that the action recently taken in petitioner's case was the application of a new general rule, and not an arbitrary *ad hoc* effort to prevent judicial redress; (3) point out that there is no likelihood of petitioner's again being subjected to "secret" clearance proceedings under the Industrial Security Program or the basis of the information now or likely to be known; and (4) discuss the rules as to mootness which this Court has been consistently applying but which petitioner disregards.

I. PETITIONER'S INCORRECT FACTUAL STATEMENTS AND ASSUMPTIONS

Although petitioner's factual errors have no direct bearing on the legal problem of mootness, it is appropriate to correct the most significant of them at the outset.[1] The true facts will help to explain the latest administrative action in this case, as well as to dispel petitioner's exaggerated and unfounded fears of further proceedings.

First, contrary to petitioner's surprising but repeated assertion (Opp. 9, 19 (fn. 8), 20), we did *not* intend to concede and did *not* concede in our memorandum on mootness that the petitioner may well be subjected again to security clearance proceedings.[2] As shown in some detail, *infra*, pp. 4–15, the contrary is true. There is no likelihood that petitioner will once again be subjected to loss of his "secret" clearance on the basis of the information now available or anticipated.

Second, petitioner recites a portion of the detailed amended statement of *charges* against him, and then implies that the final adverse findings of the Defense Department upheld each of these charges as stated

[1] We refer, of course, not to the facts relating to the original adverse determinations or proceedings against petitioner, but to the facts relating to mootness which appear on the open record. We do not deal in this memorandum with petitioner's factual errors relating to the proceedings leading to the adverse rulings.

[2] In asserting that the Government has made such a concession, petitioner misreads (Opp. 9) a sentence in our mootness memorandum (p. 7) which was designed to *contrast* the present case of a formal rescission of an administrative order with the mere cessation by a private party of injurious conduct which might recur.

(Opp. 7, 31–32). This is materially inaccurate. The actual findings are set forth with particularity in the Defense Department's letter to petitioner dated October 13, 1958 (R. 120–124). Comparison of those actual findings with the amended charges (R. 68–75) shows that certain of the pertinent charges were *not* upheld; and the omissions are quite significant. For instance, there are no findings[3] (*a*) that petitioner lied when he said that he had never had a sympathetic interest in Communism, or (*b*) with respect to petitioner's alleged affiliation or association with the Socialist Workers Party (R. 122–123). And there are affirmative findings that in the latter part of petitioner's membership in the Communist Party (1942–1943) he "became actively and outspokenly opposed to certain Communist Party policies and Communist Party endorsed candidates for union office, and [he] stopped paying Communist Party dues and stopped attending Communist Party meetings", and that he was expelled from the Party in 1943 (R. 121). Further, there are no findings as to Communist membership or associations after 1943, and no findings at all of disloyalty.

Third, petitioner repeatedly implies (Opp. 2, 6, 9, 18, 25, 27) that the Defense Department's final findings necessarily rested on acceptance of the information given by all "six secret informants" of whose existence he had been told (R. 102–104). But there is no such finding in the case; and it is commonplace in trials or hearings for the triers of fact to base their

[3] The letter of October 13, 1958, makes it clear that, to the extent that affirmative findings were not made, the amended statement of charges was *not* sustained (R. 120).

decision on less than all the witnesses, or all the information, presented by the prevailing side. For all that petitioner or his counsel really know, that well-known fact of litigation may also be the truth here.

Fourth, petitioner, who does not and cannot know the true facts, implies that the case has not been "the subject of continuing administrative review by the Departments of Defense and Justice," as we stated in our memorandum (p. 5) (Opp. 7, fn. 2). We are, of course, not at liberty to reveal the intra-government course of proceedings in the case, but in the face of petitioner's incorrect innuendo we reiterate that for some time this case has been the subject of continuing administrative review by the Departments of Defense and Justice.

II. PETITIONER'S CLEARANCE AS A RESULT OF A GENERAL CHANGE IN THE INDUSTRIAL SECURITY PROGRAM

A. To the discerning eye, the facts we have set forth or indicated in Part I, *supra,* will reveal much (concerning the clearance of December 31st) that petitioner claims to be wholly unable to see. But the most curious facet of petitioner's Opposition is its total failure to refer to, or to discuss, the pointed suggestion in the Government's mootness memorandum (pp. 10, 18–19) that the action taken in petitioner's case on December 31st was the result of a general reconsideration of one aspect of the Industrial Security Program, and therefore could not at all be an arbitrary or *ad hoc* clearance "calculated to prevent impending judicial redress against a practice whose propriety defendant continues to assert" (Opp. 21).

When petitioner's case was brought to the attention of the Acting Secretary, he reviewed generally the matters involved and determined that a modification of the Industrial Security Program was appropriate. This modification is indicated in the Acting Secretary's memorandum of December 31st on the amendment of the Industrial Personnel Security Review Regulation (Govt. Memo. 18–19), which contemplates a general change in the Program to take account of the level of classified information at which access is sought, as well as the derogatory information in a particular case. Previously, no account had been taken of the level of classified information to be revealed to the particular individual. He had to be cleared for all levels, or for none. The December 31st memorandum was intended to effect a modification of this practice for the future. Although the Defense Department regulations have not yet been formally amended to incorporate this change, we have been advised by that Department that the factor indicated in the December 31st memorandum has, since that date, been applied to all pending and new cases to which that factor pertains. As contemplated by the memorandum, the regulations will shortly be formally modified to take account of this new element.

Petitioner is a lathe operator and he was a tool and die maker (milling machine operator) in a large aircraft plant—not an important official with wide supervisory or executive functions. Accordingly, it was decided that, in the light of all the information available, he could and should be appropriately granted access to "secret" information, *whether the derogatory findings made by the hearing board were or were not true.* If those findings were in fact true,

petitioner would still be accorded his clearance; the particular adverse facts found by the board would not be enough to debar him in the light of his job and personal history.[4] And if the findings were not in fact true, or if they were reached by improper procedures, petitioner would certainly be entitled to his clearance.[5]

The result is that, once the Secretary had determined to make this general change in the Industrial Security Program, it was unnecessary for him to canvass the truth or falsity of the board's findings in petitioner's case (or the procedure by which they were reached). In effect, a demurrer to the findings could be sustained by the Secretary—conceding their truth *arguendo,* petitioner was still entitled to clearance. By like token, it would be unnecessary to adjudge, in petitioner's case, the propriety of the procedures used by the board in making its findings.[6]

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[4] It will be recalled that the hearing board finally found (*supra*, pp. 3-4), with respect to petitioner's association with the Communist Party, that his membership covered only the period 1942–1943; that it terminated by expulsion in 1943; that in the latter part of his membership petitioner became actively and outspokenly opposed to certain Communist Party policies and Communist Party endorsed candidates for union office; and that he stopped paying Party dues and attending Party meetings. See R. 120–121. There were no findings of disloyalty, or of any association with communism after 1943.

[5] No similar action was taken in the case of *Greene*, No. 190, this Term, because it was not considered that that case, taking into account its own particular facts, falls within the new policy.

[6] Petitioner assumes repeatedly, throughout his Opposition, that the Acting Secretary's determination of December 31st was based on different findings from those made by the board. As we have pointed out in the text, this is not necessarily the case.

Thus, petitioner is far wide of the mark in insisting—as he repeatedly does (Opp. 2, 8, 9, 10, 18, 25, 26-27)—on an affirmative "exoneration from or recantation of the charges" of Communist Party membership, and on "repudiation" of the "accusations" by the "secret informants." As our initial mootness memorandum makes undeniably plain, the board's adverse findings have been totally expunged as if they had never been made. More than that cannot be demanded.

The law is full of instances in which an individual has been freed (by a subsequent procedural or general ruling) from a particular sanction, based on adverse factual findings, without any requirement that new factual findings "clearing" him be made by the fact-finding tribunal or agency after the sanction has been removed. In the criminal law, defendants routinely have their convictions set aside or reversed, after trial and verdict, for defects in the indictment, failure to state an offense, trial or procedural errors, or defenses such as the statute of limitations or lack of jurisdiction, etc. Obviously, a defendant so freed cannot insist on new findings or a new verdict declaring that, as a matter of actual fact, he did not do the acts with which he was charged; indeed, a defendant whose conviction is finally reversed on such grounds cannot compel the appellate court to go further and inquire into the sufficiency of the evidence, even though he contends that such a factual inquiry would demonstrate his innocence of the acts charged and thus clear him of any possible "taint" arising from the original verdict.

496406—59——2

The same has been true of security determinations which have been overturned for jurisdictional reasons. In *Peters* v. *Hobby*, 349 U.S. 331, the adverse findings of the Loyalty Review Board were expunged for lack of jurisdiction, but the Board was not required to make new findings favorable to that petitioner. In *Cole* v. *Young*, 351 U.S. 536, the Court invalidated Cole's discharge as improperly based on the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. 22–1, but there was no requirement that the Department of Health, Education, and Welfare then make new findings of fact favorable to him. Similarly, in *Service* v. *Dulles*, 354 U.S. 363, the adverse determination and findings were expunged, but the State Department was not required to make new favorable findings. It was sufficient to expunge the old findings and determinations.

So here, the adverse findings and determinations have been completely expunged and superseded as a result of reconsideration under the modification adopted in the Defense Department on December 31, 1958. It is just as if the regulations had been formally amended, and petitioner's case reviewed and reconsidered (and petitioner granted clearance) under that change, which makes irrelevant any further inquiry into the particular facts of his case. The controversy has been effectively ended, as part of a general change in the Industrial Security Program, by the only administrative determination petitioner sought or could seek, *i.e.*, a clearance for access to "secret" information. See also *infra*, pp. 14-15, 21–24.

Moreover, petitioner has not been treated, with respect to the making of new findings, any differently from others who have been granted clearance after first being denied it. In the Industrial Security Program, it has been the practice, when a prior public decision adverse to the employee is reconsidered and clearance granted, simply to announce that clearance is now accorded; it has not been the practice to make new, favorable, findings. Accordingly, petitioner has no ground for complaint that in this respect he has been discriminated against, or treated otherwise than pursuant to the normal prevailing procedures.

B. Petitioner contends further that the action of the Secretary of Defense granting him a security clearance violated the regulation governing the Industrial Security Program in two respects (Opp. 8, 26-27, 28):—(1) The Secretary did not include as part of his determination a finding with respect to each allegation set forth in the Amended Statement of Reasons, as provided in Paragraph 20d of Defense Department Directive 5220.6; and (2) the Secretary found that the grant of a clearance to petitioner "is in the national interest," rather than "clearly consistent with the interests of the national security," which is the over-all standard prescribed by the directive.

The complete (but not the only) answer to this contention is that the Secretary of Defense could not have violated this regulation since he did not bind himself by it. The directive was issued to govern the operation of the Industrial Personnel Security Review Program, which it established, and the Secretary

was not designated as a full element of that program.[7] Thus, petitioner can derive no support from cases like *Service* v. *Dulles*, 354 U.S. 363, and *Accardi* v. *Shaughnessy*, 347 U.S. 260, which hold that an executive officer can limit his own authority by regulations made binding upon himself even though, in the absence of such self-imposed limitations, he would have possessed sufficient power to take the action under challenge. Here, the power of the Secretary to grant access to classified military information, and his power to review the determinations of the industrial security boards, was not limited by the procedures applicable to those boards, or by any other procedures. Under the directive, determinations of the Industrial Personnel Security Review Board are to be final subject to reversal by the Secretary of Defense.[8] In exercising this review power, the procedures to be

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[7] Paragraph 5 of the directive provides:

Program. There is hereby established the Industrial Personnel Security Review Program, consisting of the following elements:

a. The Office of Industrial Personnel Security Review.

b. The Industrial Personnel Security Screening Board (hereinafter called the Screening Board).

c. The Industrial Personnel Security Hearing Boards (hereinafter called the Hearing Boards).

d. The Industrial Personnel Security Review Board (hereinafter called the Review Board).

[8] Paragraph 21b of the directive provides:

b. The determination of the Hearing Board as announced by the Director pursuant to paragraph a above shall be final subject only to:

(1) consideration by the Review Board at the request of the Director, the Secretary of Defense, or the Secretary of any military department; or

(2) reconsideration by the Hearing Board at the request

employed by the Secretary and the grounds upon which he may act are not prescribed by the regulation but are left to his complete discretion as the head of the Department. Petitioner's argument ignores this clear meaning of the directive.

Not only has the regulation not been made binding in this respect upon the Secretary of Defense, but the requirement of Paragraph 20d that findings be made with respect to each allegation contained in the Statement of Reasons is expressly made applicable only to the Industrial Personnel Security Hearing Boards. The heading of Paragraph 20 is *"Hearing Board Determination"* and it is this determination, not the determination of the Secretary of Defense, which under subparagraph d must "include a finding with respect to each of the allegations set forth in the Statement of Reasons." See also Paragraph 22a. In no place does the regulation impose such a requirement upon the Secretary, who is free to grant a security clearance for whatever reason he deems adequate and with-

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of the Director on the ground of newly discovered evidence or for other good cause shown.

Paragraph 22c of the directive provides:

c. Determinations of the Review Board shall be final, subject only to:

(1) Reconsideration on its own motion or at the request of the person concerned, addressed through the Director, on the ground of newly discovered evidence or for other good cause shown;

(2) Reconsideration by the Review Board at the request of the Secretary of Defense or the Secretary of any military department; or

(3) Reversal by the Secretary of Defense, or reversal by joint agreement of the Secretaries of the three military departments at the request of one of such Secretaries.

out making or publishing any particular factual conclusions with respect to the employee involved.[9]

For similar reasons, petitioner is not in a position to complain of the Secretary's failure to mention the over-all standard of the directive that a clearance must be denied or revoked if it "is not clearly consistent with the interests of the national security." For this is obviously not a requirement included in the regulation for the benefit of the employee under consideration; it affords no procedural or substantive rights but is a guide to the industrial security boards designed to afford the maximum protection for classified military information, and was not intended to bind the Secretary himself.[10] Although the security boards had previously concluded, on the basis of certain findings, that the grant of a clearance to petitioner would not be clearly consistent with the national security, those findings have been expunged, so that any possible injury resulting to petitioner from them has been

[9] In addition, it should be pointed out that although the regulation requires the *boards* to *make* findings there is no requirement that the findings be *published* to the individual concerned. As noted above (*supra*, p. 9), it has not been the practice to *publish* findings when a determination *to clear* is made and announced.

[10] Even if the standard of "clearly consistent with the interests of the national security" were binding on the Secretary under the regulation, we do not believe that an individual as to whom the Secretary might apply a lesser standard would have any standing to complain under *Accardi* and *Service*, *supra*. Those decisions stand for the proposition that an individual has a right to demand that the head of a department comply with regulations imposed for the benefit of the individual. There is nothing in the opinions suggesting that the head of a department cannot loose the strict bonds of a regulation where such lenity would be to the advantage of the individual.

undone as completely as could be required by a decision of this Court. Once the adverse findings have been superseded, if the Secretary of Defense then determines that it is desirable to grant petitioner (and those in the same situation) a clearance under a different principle than the rules previously imposed solely for the benefit of the Government, petitioner has no cause whatever to complain—he has received his clearance, and no findings adverse to him now exist. Realistically, petitioner is relying not on an alleged right to a security clearance, nor on a right not to be found a security risk without certain procedural protections, but on an asserted right to an affirmative determination by the Department of Defense that his access to defense secrets would in no way jeopardize the national security. There is no basis in the regulation or in any statute for this contention that, if a clearance is granted to him, it must be accompanied by such an affirmative determination couched in those terms. In making the change contemplated by his memorandum of December 31st (discussed *supra,* pp. 4–6), the Secretary was free to decide that "the national interest" (the term he used in petitioner's clearance order) would appropriately call for a consideration of the employee's position and personal history in determining whether his clearance would be "clearly consistent with the interests of national security."

III.

THE UNLIKELIHOOD OF FURTHER SECURITY PROCEEDINGS AGAINST PETITIONER

Petitioner makes much of the "substantial likelihood"—as he puts it—of renewed security proceedings

against him (Opp. 19). In reality, this "danger" does not exist under the present or the reasonably foreseeable circumstances, and the information available.[11]

As pointed out in Part II, *supra*, the Industrial Security Program has been so modified that individuals of petitioner's level of position, and with petitioner's type of personal history, will be cleared for access to "secret" defense information, where necessary for their work. Petitioner's clearance was accorded under that general change in the Program. It was also accorded by the head of the Department of Defense who had available all of the information about petitioner known to that Department. On the basis of that information, collected by extensive investigation, there is no likelihood of renewed security proceedings against petitioner. A general rule has been established and petitioner's case has been evaluated, at the highest level, under that new general principle. The courts will not treat "as a serious danger" that a high government official or agency "will change a deliberately formulated policy after urging it on this Court against the [petitioner's] standing to ask for relief." *Eccles* v. *People's Bank*, 333 U.S. 426, 433.

Petitioner complains repeatedly that the security regulation is still in effect (Opp. 9, 18, 28), but he singularly fails to note that the Program has been modified (and the regulation will be formally amended) on a point decisive for his and comparable cases. The provisions of the regulation as to hearings

[11] This is not the place to discuss petitioner's broad, general, and inaccurate charges against the conduct of the Industrial Security Program as a whole (Opp. 22–25). We confine ourselves to petitioner's own case.

and "confrontation," which petitioner challenges, remain intact, but (as we have shown *supra*, pp. 5–8) so far as petitioner's case is concerned those provisions are now irrelevant. He has been granted clearance, whether or not the expunged findings previously made under the disputed procedures were accurate, and whether or not those procedures are proper in his particular class of case.

In other words, the Industrial Security Program, as it now stands, presents no "threat" and no "danger" to this petitioner. There is no likelihood of a recurrence of proceedings against him. He is in at least as good a position as the hundreds of thousands of other individuals who have been cleared for access to defense information. In one sense, his position is even better, since his particular case has been reviewed at the highest departmental level under the new principle adopted at that level. If petitioner continues nevertheless to have a "case" or "controversy" with the Defense Department, so do all of the thousands of others whose cases have been considered under the Industrial Security Program and who have been accorded clearance. Each of them has as much right to maintain suit as does petitioner. But it is perfectly plain that those hundreds of thousands have no case or controversy with the Defense Department. See also *infra*, pp. 22–24.[12]

[12] Petitioner complains (Opp. 9) of being required to fill out new personnel security questionnaires, etc. On inquiry, we have ascertained that these requirements were exclusively *company*-imposed by the Bell Aircraft Corporation, incidental to petitioner's reemployment. These requirements are *not* Government-imposed, and most emphatically petitioner is *not* now

IV. THIS COURT'S JURISPRUDENCE ON MOOTNESS, AS APPLIED TO PETITIONER'S CASE

A. Where the challenge is to formal government action which is formally withdrawn or ended during the course of the litigation, this Court's decisions –both those cited in our initial memorandum on mootness and those relied upon in petitioner's Opposition– have consistently followed the principle that the litigation is moot unless there is a strong, real, or substantial likelihood that the challenged government action will be repeated against the particular person. Despite petitioner's strenuous assertions, the Court has *not* applied the standard that, for mootness to result, recurrence must be absolutely impossible or the government agency must be entirely incapable of repeating the challenged action.

1. In our initial memorandum on mootness (pp. 7–8), we referred to several of the Court's decisions applying this principle of mootness to government orders or actions.[13] In several of those cases, there

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"once more" being subjected to "the standard security clearance procedure" of the Government (Opp. 9). The Government has taken no steps whatsoever to have petitioner fill out new questionnaires, etc.

[13] Petitioner dismisses most of these cases (Opp. 16) on the ground that they were decided without opinion, or that the suggestion of mootness was unopposed. But it has been customary in recent years for the Court to dispose of cases on the ground of mootness by a *per curiam* order; and the fact that no opposition was presented may well mean that counsel in those cases recognized the governing rules of mootness which this Court has been applying. Moreover, whether opposed or not, those decisions of mootness are formal and binding adjudications by the Court that no case or controversy existed any longer.

had been no announced change in policy or program (as there has been here), but simply a withdrawal or ending of the particular challenged order. In many of them, the possibility of recurrence was substantially greater than in this case where a general change has been announced and is now being followed. See *e.g.*, *Association of Lithuanian Workers* v. *Brownell*, 355 U.S. 23 (withdrawal of designation under the Attorney General's "subversive list," without any announced change in policy); *Garcia* v. *Landon*, 348 U.S. 866 (withdrawal of deportation order, which could be reissued); *National Association for the Advancement of Colored People, Inc.* v. *Committee on Offenses*, 358 U.S. 40 (expiration of state legislative committee, which could be reestablished); *United States* v. *Amarillo-Borger Express, Inc.*, 352 U.S. 1028 (expiration of ICC order capable of being repeated); *Bracken* v. *Securities and Exchange Commission*, 299 U.S. 504 (withdrawal of administrative subpoena, which could be reissued); *Howard* v. *United States*, 340 U.S. 898 (expiration of grand jury, but petitioner could be called before another grand jury); *Montgomery Ward & Co.* v. *United States*, 326 U.S. 690 (return of seized property, which could be reseized); *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360 (same); *Gray* v. *Board of Trustees*, 342 U.S. 517 (admission of colored students to the University of Tennessee); *St. Pierre* v. *United States*, 319 U.S. 41, 43 (expiration of contempt sentence; real possibility of future questioning).

In these decisions and others, the Court has clearly indicated that the mere "possibility" or "capability" of renewal of the withdrawn or expired order is in-

sufficient to make a continuing "case" or "controversy."

2. Petitioner relies (Opp. 11, 14–16, 20, 21), almost solely, on three or four of the Court's decisions which do not at all support him because they stand only for the proposition that mootness may not result where there is shown to be a strong, real, or substantial likelihood of repetition (not a mere "possibility" of renewal). In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, the probability of repetition was clear; the I.C.C. order was a short-term one, almost certain to be repeated in similar short-term fashion. In those circumstances, the Court referred to the questions involved in the administrative order as manifestly continuing in nature (p. 519).[14] Cf. *St. Pierre* v. *United States,* 319 U.S. 41, 43. *McGrain* v. *Daugherty,* 273 U.S. 135, 180–182, was a comparable case in which a continuing Senate committee was apparently ready to resume its inquiries if the Court upheld its authority. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 413–414, involved amended regulations containing the same disputed requirements as the regulation originally attacked. And in *Leonard* v. *Earle,* 279 U.S. 392, 398, an action to compel issuance of a license for the next year was not mooted by the expiration of the year, where it was clear that the plaintiff intended to continue in the licensed business and the defendant official would in-

[14] The Court also referred to the fact that the Commission's order might, to some extent, be the basis of further proceedings (p. 515). See also, to this effect, *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U.S. 433, 452.

sist on compliance with the challenged requirements before issuing the necessary license.[15]

The gist of these latter decisions (which form the core of petitioner's Opposition) is that the ending, expiration, or suspension of the challenged administrative order will not moot the case *if*, but only if, the order continues to have substantial legal effects *or* there is a real (not merely a theoretical) likelihood that the order will be repeated or renewed as to the complaining parties. As we have shown, *supra*, pp. 4-15, that is not this case. The order denying petitioner clearance has been expunged and superseded. A new order has granted the clearance pursuant to a general modification in the Industrial Security Program. In the present circumstances or those reasonably foreseeable, there is no real likelihood that this petitioner (or those similarly situated) will again be subjected to adverse security proceedings.[16]

3. Petitioner attacks the principles of mootness which the Court has been applying to withdrawal of challenged government orders as an unfair "double standard" (Opp. 14, 16), because mootness has sometimes not been found where *private persons* merely cease their illegal or wrongful conduct. But petitioner

[15] Likewise, in *Henderson* v. *United States*, 339 U.S. 816, 823, the challenged order of the ICC was still outstanding and would probably affect the petitioner if he traveled again by railroad.

[16] *Gray* v. *Board of Trustees*, 342 U.S. 517, 518, was an action to compel the university admission of some Negro students, and of other Negroes "similarly situated." This Court held the action moot (over opposition), where the plaintiffs' requests for admission were granted during litigation and "there is no suggestion that any person 'similarly situated' will not be afforded similar treatment."

ignores that the action of the Secretary of Defense in this case was not simply a "cessation" of conduct challenged as unlawful—as is the case when a private party discontinues an asserted violation of law. An official order was expunged and superseded, and a different order officially issued which has ended all asserted injury to petitioner. In such a case, it is appropriate to accept the formal official action on its face, unless there is good reason to believe otherwise. See *Gray* v. *Board of Trustees,* 342 U.S. 517, 518, footnote 16, *supra; Eccles* v. *People's Bank,* 333 U.S. 426, 433, quoted *supra,* p. 14.[17]

Moreover, the basic issues petitioner raises are constitutional, and constitutional issues should not be decided in the absence of a concrete, present, actual, and existing controversy in which the parties' rights are really at stake.[18] In litigation in which the questions are statutory, common-law, or factual—non-constitutional issues—it may be proper to accede to the "public interest in having the legality of the practices settled" (*United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632). But the special canons of constitutional adjudication,

[17] Something should also be said for the public interest which the Government was vindicating in the line of cases in which private parties have merely ceased violating a statute or regulation, and the Government still seeks an adjudication. Petitioner can ask to vindicate, not a public right, but only his own private rights; and he can attempt to redress only his own alleged private injuries. He cannot rightly claim to be acting on behalf of others. And since his own claims have been satisfied, there is nothing left for him to vindicate by this suit.

[18] See *e.g., United Public Workers* v. *Mitchell,* 330 U.S. 75, 90; *United States* v. *Automobile Workers,* 352 U.S. 567, 589-590; *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346-348; *Rescue Army* v. *Municipal Court,* 331 U.S. 549.

which strongly counsel the avoidance of constitutional determinations if possible, do not permit similar leeway in a constitutional case like the present one where the petitioner will obtain nothing by a reversal of the decision below. Cf. *United States* v. *Johnson*, 319 U.S. 302, 305.

B. Petitioner also makes some claim that he has not received all the relief from the respondents to which he is legally entitled (Opp. 17–19). We need not repeat the demonstration in our opening mootness memorandum (pp. 5–7) that, having received the clearance he sought, petitioner can properly ask nothing more. The prayers of his complaint are set out in footnote 2, page 6, of our earlier memorandum. The first prayer is for a hearing with opportunity to confront adverse witnesses. But obviously petitioner cannot now demand a hearing for its own sake; and the hearing he asks would now serve no purpose whatever since its objective could be only to help petitioner clear himself, and that is no longer necessary now that he has received his clearance.[19]

The second prayer is for a declaration that the determination of June 14, 1957 (and presumably the later determination of October 13, 1958) is in violation of his constitutional rights. But the adverse determinations of June 14, 1957, and October 13, 1958, have been wholly expunged and superseded as if they had

[19] Petitioner's first prayer does not even ask that the Defense Department make findings on the basis of the hearing he still demands. Presumably, it is petitioner's present position that the hearing should be held even though no findings are to be made by the Department!

never been; they no longer have any vitality or effect. There is therefore nothing outstanding on which this Court can operate; and the naked request for a declaratory judgment of illegality cannot suffice to keep the controversy alive. There was a similar request for a declaratory judgment in *Association of Lithuanian Workers* v. *Brownell*, 355 U.S. 23, but this Court nevertheless held the case moot. See also, to the same effect, *St. Pierre* v. *United States*, 319 U.S. 41; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 416, 418; *Gray* v. *Board of Trustees*, 342 U.S. 517—all indicating that a request to declare the illegality of past conduct, with no future operative effect, cannot avail to prevent mootness.

The third of petitioner's prayers in his complaint is that the respondents be restrained from enforcing the prior adverse determinations—which the prayer says should be reversed, rescinded, and annulled. Again, there is nothing left for the Court to do, and no need for the relief requested. The adverse determinations are no longer in effect, but have been fully expunged and superseded.

Petitioner did not ask, in his District Court complaint, for declaratory or injunctive relief with respect to the Defense Department's industrial security regulation itself, and his petition for certiorari centered on the particular administrative determinations against him rather than on the regulation as such (Pet. 2–3, 6–7). Nevertheless, he now asserts a right to a broad declaratory adjudication that the "no-confrontation requirement of the Defense Department's Industrial Security Hearing Regulations is

constitutionally and statutorily defective" (Opp. 18). Of course, as pointed out above (p. 15), petitioner now has no more right to such a declaration than the hundreds of thousands of others who have been processed and cleared under the Industrial Security Program. At least in the absence of grounds for believing that the regulation will be applied adversely to him, the mere existence of the regulation does not give any person or employee—no matter how much he may disagree with or deplore it—the right to an adjudication that the regulation is invalid. For the regulation imposes no present duties or requirements, and demands no action. It has no effect until the security clearance process is begun and the regulation is invoked. Just as with a comparable statute which is abstractly claimed to be invalid by persons not directly affected, no actual case or controversy can exist until, at the very least, there is a likelihood that the regulation will be invoked or applied or used against the particular claimant. Otherwise, the careful confines of federal adjudication would be largely nullified at the behest of litigants eager to test, abstractly, the lawfulness of all kinds of legislative or administrative action. Even though such questions may be important and their resolution useful, the federal courts have no power to decide them as an aid to possible *future* controversies or as a guide to future action. *Bus Employees* v. *Wisconsin Board,* 340 U.S. 416, 418; *St. Pierre* v. *United States,* 319 U.S. 41, 42; *United States* v. *Alaska S. S. Co.,* 253 U.S. 113, 115–116; *California* v. *San Pablo & Tulare R. R. Co.,* 149

U.S. 308, 314; cf. *Eccles* v. *People's Bank*, 333 U.S. 426, 431–432.

CONCLUSION

We have been at pains to set forth our position in detail, because petitioner's Opposition reveals a gross misunderstanding of both the facts and our legal position on mootness. Petitioner has sought to create a strawman out of a congeries of bits and pieces. We believe that the Court should be informed of what has actually happened in this case. In addition, petitioner plainly desires to compel after-the-event adjudication of his case because he hopes that it will lead, *for others*, to the general legal rule he sponsors. But this approach is directly opposed to the whole federal judicial tradition. And we are frank to say that in any event we do not believe it a desirable practice, unless necessary to protect the claimant's own legal rights, for the Government to be forced to defend the legality of past administrative action which the administrators, on proper reconsideration of their administrative powers and discretion, have decided should be rescinded and changed and no longer kept in effect.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

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